

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





assigned to  
Bagley

John McQuinn  
9-25-59  
M.B. 7  
10:15 am  
1st floor

BRIEF FOR APPELLANT AND JOINT APPENDIX

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,827

United States Court of Appeals  
For the  
District of Columbia Circuit

FILED MAY 9 1959

Joseph W. Stewart

CLERK

EARL B. WRIGHT,

Appellant,

v.

DISABLED AMERICAN VETERANS,  
a corporation,

Appellee.

677

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ROBERT T. SMITH

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Washington, D. C.

W. PERRY DOING

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Washington, D. C.

Attorneys for Appellant



facts:

1.  $\pi$  sues  $\Delta$  for BOK alleging that he was discharged by  $\Delta$  in violation of  $\Delta$  corp's Const. & rules
2.  $\pi$  had been sick from May 10 to Aug. 1 - out of work - when he was dropped from the rolls
3.  $\Delta$  says his status was that of employee w/o salary
4.  $\pi$  put on his case - was not allowed to go into damages.
5. at end of  $\pi$ 's case Holtoff directed verdict for  $\Delta$  after argument in which  $\Delta$ 's counsel explained the provisions of the Const., saying that  $\pi$  was never fired & so was not required to be given a hearing.
6. He did not get in touch with employer, but put it in hands of counsel

- Did  $\pi$  make out a prima facie case
1. as a matter of common sense it would seem that  $\pi$  made out a prima facie case of BOK when he showed the K, showed apparent noncompliance by  $\Delta$  to terms of Const. in terminating employment. It was then up to  $\Delta$  to go forward with his affirmative defense of confess & avoid. This defense should be subject to cross (defense: construction of by-laws by expert.)
  2. The fact that  $\pi$  did not get in contact with employer after sickness does not in law show that he was not already he put walking & able esp after he said he put it in hands of lawyer

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### QUESTIONS PRESENTED

1. In a suit for damages where the plaintiff alleged his employer had wrongfully terminated his contract of employment, did the court properly direct a verdict for the defendant at the conclusion of plaintiff's case stating as its reason therefor that there was no direct proof that the plaintiff was discharged, when written communications of the defendant corporation evidencing the termination of the plaintiff's employment had been admitted in evidence and remained unrefuted or explained by the defendant?

2. Did the court properly permit the National Judge Advocate of the defendant corporation, who appeared as co-counsel for the defendant, to give testimony to the trial judge without first having been sworn or subjected to cross-examination by the plaintiff?

3. Did the court properly direct a verdict for the defendant without giving consideration or permitting the plaintiff to testify regarding his claim for One Thousand Nine Hundred Fifty (\$1,950.00) Dollars for accrued leave due him by the defendant?



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UNITED STATES COURT OF APPEALS  
For The District Of Columbia Circuit

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No. 14,827

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EARL B. WRIGHT,

Appellant,

v.

DISABLED AMERICAN VETERANS,  
a corporation,

Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR APPELLANT

---

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the District of Columbia entered on the 27th day of May, 1958, in favor of the defendant below by direction of the Court. Jurisdiction of this Court is invoked under 28 U.S.C.A. 1291 (1952).



## STATEMENT OF THE CASE

The appellant, a National Service Officer of the Disabled American Veterans, a corporation, sued the corporation for damages, alleging that his employment as a National Service Officer had been terminated improperly (J.A. 5). The appellant, himself a disabled veteran, had been employed continuously as a National Service Officer of the appellee corporation, hereinafter referred to as the D.A.V., from 1946 until his employment was ended on August 1, 1955 (J.A. 6). In support of his contention that his employment had been improperly terminated there was introduced into evidence certain pertinent provisions of the Constitution and By-Laws of the D.A.V., as well as letters and memoranda of the appellee corporation.

Article VII, Section II, paragraphs 2 and 3 of the Constitution and By-Laws provide as follows:

"Para. 2. The term of employment of a National Service Officer shall not commence until he is certified by the Veterans' Administration and shall continue only so long as such certification is in effect." (J.A. 9)

"Para. 3. No National Service Officer shall be removed, discharged or transferred except for cause, after reasonable notice specifying the reason therefor." (J.A. 9)

"Article 7, Section 1, paragraph 5 provides that no paid employee of the National Organization, while a member in good standing of the Disabled American Veterans or of its Women's Auxiliary and who has been so employed continuously for a period of five years shall be discharged or his employment terminated involuntarily except upon a personal hearing upon thirty days' written notice before the National Executive Committee and the approval of that committee by a two-thirds vote, which action shall be final. The National Commander may suspend any such employee for cause pending the hearing.

"All employees shall be subject to Article 12 of these by-laws.



"The National Commander may suspend any appointed paid or non-paid officer or employee without first preferring charges for a period within his discretion of not to exceed 90 days to enable the Commander to investigate them. The salary, if any, of such suspended officer or employee shall be paid to him during such suspension. Such suspension shall terminate automatically at the end of 90 days unless charges are filed, in which case the provisions relating to suspension after charges are filed shall become operative."

The appellant contends that his employment was terminated contrary to the foregoing provisions. To further substantiate the fact that his employment was terminated, which fact is denied by the appellee, the following letters and memoranda of the D.A.V. were submitted in evidence:

Appellant's Exhibit 8 (J.A. 27) was a letter from Mr. Cicero F. Hogan, National Director of Claims of appellee corporation and appellant's immediate supervisor, to Mr. Edward E. Odum, General Counsel of the Veterans Administration, notifying him that the appellant's recognition as a National Service Officer to represent disabled veterans had been cancelled.

Appellant's Exhibit 3 (J.A. 24) was a letter to Mr. Cicero F. Hogan, the National Director of Claims of the appellee corporation and the immediate supervisor of the appellant, from Edward E. Odum, the General Counsel of the Veterans Administration, acknowledging Mr. Hogan's request that the appellant's recognition as a credited representative of the Veterans Administration be cancelled, and notifying Mr. Hogan that Mr. Wright's recognition had been terminated in accordance with his request.

Appellant's Exhibit 4 (J.A. 24) was a memorandum of the D.A.V. to the appellant dated August 12, 1955, notifying him that his insurance policy which the D.A.V. carried on him as an employee of the corporation, had been terminated.



Appellant's Exhibit 5 was an interoffice memorandum of the appellee corporation dated August 9, 1955, by Mr. Cicero F. Hogan's secretary, notifying the Accounting Department of appellee corporation to discontinue the appellant's benefits as he was no longer on appellee's payroll.

There was also introduced into evidence a copy of the employment record of the D.A.V. indicating that appellant's employment had been terminated on August 1, 1955. (J.A. 9)

The appellant testified that he had been ill since March 1955 and was still unable to attend to his duties with the D.A.V. due to his illness at the time his employment was terminated (J.A. 14-16). He testified that he did not acquiesce in the termination of his employment and that he considered his employment terminated when he was notified that his certification to appear before the Veterans Administration was cancelled and other benefits cancelled (J.A. 8). He then testified that he turned the matter over to his lawyer who had handled the matter from that time on and communicated his intention to return to work (J.A. 18). Appellant denied that he had abandoned his position but testified that he was too ill to work at the time his employment was terminated, and that he never indicated unwillingness to return to work (J.A. 13-16). The appellant, upon inquiry from the trial court, informed the court that he had concluded his evidence pertaining to the improper termination of his employment. Whereupon, counsel for the appellee moved the court for a directed verdict. (J.A. 17).

On argument of the Motion for a Directed Verdict, counsel for the appellee admitted that appellant's status as a National Service Officer had been terminated, but argued that that did not mean he was not still an employee of the appellee. (J.A. 20-21).

The court then permitted Sylvester Hoffman, the Judge Advocate for the appellee corporation, to be heard, and he advised the court that he had played a great part in drafting the Constitution and By-Laws of



the appellee corporation, and that a National Service Officer's certificate to appear before the Veterans Administration could be cancelled, and later reinstated, but he did not point out to the court any provisions in the Constitution which provided for such procedure, nor did he offer any explanation of his statement that the appellant's employment had not been terminated because his certification had been withdrawn (J.A. 20-21).

There was also no explanation given as to why the appellant was not afforded a hearing as provided in paragraph 5 of Article VII of the Constitution of the appellee corporation other than that the appellant did not ask for such hearing. (J.A. 21).

#### POINTS RELIED UPON BY APPELLANT

1. The court erred in directing a verdict for defendant at the conclusion of the plaintiff's case.
2. The court erred in hearing and considering unsworn testimony given out of the presence of the jury.
3. The court erred in directing a verdict for the defendant without first having heard all of the evidence bearing on all of the issues in the case.

#### SUMMARY OF ARGUMENT

The evidence presented by the appellant, who was the plaintiff in the court below, was sufficient to constitute a prima facie case in his favor. There were material issues of fact involved which should have properly been submitted to the jury. As long as there exists the possibility of a finding in the plaintiff's favor, the court should not direct a verdict against him without requiring the other side to go forward.



## ARGUMENT

Appellant seeks review of a directed verdict of the trial court in a case where material issues of fact were involved which raised contrary inference of law. Appellant contends that the issues of fact should have been submitted to the jury.

Appellant further seeks review of the action of the trial court in considering unsworn testimony of a witness made out of the presence of the jury. The appellant contends this procedure was improper and prejudicial to his rights.

## I

THE COURT ERRONEOUSLY DIRECTED A VERDICT  
FOR THE APPELLEE.

The language of Article VII, Section 11, paragraph 2 of the By-Laws of the D.A.V. is clear and unambiguous (J.A. 9). This section spells out the term of employment of a National Service Officer. It says that the term of employment shall not commence until he is certified by the Veterans Administration and that the term of employment shall continue only so long as said certificate is in effect. The employment of the appellant was thus terminated when his certification was withdrawn by the appellee as evidenced by appellant's Exhibit No. 8 (J.A. 27), which is a letter from an officer of the appellee corporation and the appellant's immediate supervisor withdrawing the appellant's certification to represent disabled veterans before the Veterans Administration. There is no dispute about the fact that his certification was withdrawn (J.A. 6). Section 11, paragraph 3 of the By-laws prohibits the termination of a National Service Officer's employment except for cause and reasonable notice stating the reasons for such termination. The record shows that the appellant did not receive any notification from the appellee that his credentials were to be withdrawn, nor was any reason given him for this action (J.A. 16).



There is a further provision of Article VII of the By-Laws of the D.A.V., Paragraph 5 thereof (J.A. 8), which further spells out the procedure necessary to terminate the employment of a D.A.V. employee. This paragraph applies to employees who have been continuously employed by the D.A.V. for a period of five years. There is no dispute that the appellant was appointed a National Service Officer in 1946 and thereafter served continuously in such capacity until August 1955 (J.A. 4-11). Appellee in its answer admits that during all of this time appellant was a member in good standing of the organization of the D.A.V. as required by the appellee of the appellant (J.A. 4). The afore-said paragraph 5 of Section 11 of Article VII of the By-Laws protects such an employee from the termination of his employment without first affording him a personal hearing upon 30 days written notice before the National Executive Committee and further requires a two-thirds vote of that Committee to terminate his employment.

To further substantiate his contention that his employment had been terminated, the appellant submitted other records and data of the D.A.V. bearing on this issue. For instance, appellant's insurance policies which were paid for by the appellee during the term of his employment were cancelled (J.A. 11-12); an interoffice memorandum notifying the Accounting Department of the D.A.V. to discontinue the appellant's benefits as he was no longer on the appellee's payrolls and a memorandum of the National Adjutant notifying a Mr. Forsyth of the D.A.V. that it would not be necessary to supply further reports of appellant's leave as his employment had been terminated were introduced into evidence (J.A.25-26 ).

The court in its ruling said "there is no direct proof that he was ever discharged although there was evidence in the records that he was taken off the payroll and his credentials were withdrawn as of August 1, 1955" (J.A. 22). This ruling of the court seems incredible in view of the foregoing evidence, and especially in view of the letter



of the D.A.V. to the Veterans Administration withdrawing the accreditation of the appellant (J.A. 3) and the letter of the General Counsel of the Veterans Administration notifying the D.A.V. that the appellant's certification in presenting claims before the Veterans Administration was being terminated as of August 4, 1955, and stating that a copy of the letter was being forwarded to the appellant (Appellant's Exhibits Nos. 8 and 3; J.A.24-27 ). The court further ruled that appellant was not removed within the meaning of the provisions requiring a hearing upon 30 days written notice but that he was dropped from the rolls because he had not reported for work for a period of five months and his sick and annual leave had apparently expired. This ruling is clearly erroneous because, as will be hereinafter more fully discussed, the question of whether his annual and sick leave had expired was a disputed question of fact involved in this case upon which the court had refused to hear any testimony (J.A. 17).

Appellant's Exhibit 6 clearly states that the employment of the appellant had been terminated (J.A. 26) (Underscoring supplied). This Exhibit was from the appellee's own records. Certainly, in the interest of justice the appellee should have been called upon to explain the meaning of this written statement contained in its records. It is difficult to understand how the trial court could reach the conclusion that the appellant's employment was not terminated but that he was merely dropped from the rolls in light of this evidence.

Furthermore, in its ruling the court held that although the appellant became able, ready and willing to go back to work in November of 1955, he had testified that he had made no effort to report to work or offer his services or go on with his employment. This ruling is contrary to the evidence in the case. Appellant testified that he did not acquiesce in the termination of his employment, that the termination was involuntary as far as he was concerned and that when he was notified that his certification to appear before the Veterans Administration



was cancelled, and his other benefits cancelled, he considered his employment with the D.A.V. to have been terminated (J.A. 8-13). When asked by the court what he did after receiving said notice, he was stopped several times, when he attempted to answer, the court stating that his answers were not responsive to the question. Appellant testified, however, that after he received notice that his credentials had been withdrawn he turned the matter over to his attorney (J.A. 19) and that his attorney had communicated his intention to return to work to the D.A.V. (J.A. 18). The court did not inquire as to what transpired in the negotiations between his attorney and the D.A.V. Furthermore, he stated that he had never informed the D.A.V. that he did not intend to return to work, prior to the cancellation of his credentials and had kept in contact with the D.A.V. personally and through his wife during the period of his illness (J.A. 13-15). It is submitted that it is obvious the negotiations were unsuccessful and the appellee persisted in its position that the appellant had abandoned his employment, otherwise this suit would not have been instituted.

The appellant contends that as a matter of law the court erred in directing a verdict for the appellee in view of the clear and unambiguous language of the Constitution and By-Laws of the D.A.V. and the written records of the D.A.V. which clearly state that the employment of the appellant had been terminated.

The appellant further contends that the court erred in directing a verdict in favor of the appellee as there was a genuine issue of fact as to whether the appellant had voluntarily abandoned his employment as contended by the appellee or whether his employment was involuntarily terminated as contended by the appellant. In support of this contention the appellant cites the following authorities:

In the case of Jackson v. Capital Transit Co., 69 App. D.C. 147 (99 F. 2d 380), it was held:



"On motion for directed verdict, evidence must be construed most favorably to the plaintiff, and plaintiff is entitled to the full effect of every legitimate inference from the evidence."

See also: Bell v. Brown, 76 U. S. App. D. C. 5 (128 F. 2d 317) and Schwartzman v. Lloyd (two cases) 65 App. D. C. 216.

The appellant submits that his case from all practical purposes is analogous with Roth v. Brownell, Jr., Attorney General of the United States, et al., 94 U. S. App. D. C. 318. Roth was an attorney appointed by the Department of Justice and was removed from his position without prior notice of his removal or any charges preferred against him. Roth contended that his removal was contrary to the provisions of the Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948); 5 U.S.C.A. Sec. 652(a). This Act provides that any person in classified Civil Service of the United States should not be removed or suspended without notice and charges preferred against him; that he should be furnished with a copy of such charges; that he be allowed a reasonable time for filing a written answer; that he be furnished with a written decision. None of these conditions were complied with in the dismissal of Roth who had been dismissed by letter following the removal of his position by executive order from the classified Civil Service. The court held that Roth was once in the classified Civil Service and did not leave it voluntarily, and is now out of it. The court went on to say that no matter how he was removed there was no compliance with the Lloyd-LaFollette Act and, "that the formula for excepting the kind of position a person held, nor any other formula could obviate the requirements of that Act." The appellant contends that the Constitution and By-Laws of the D.A.V. are just as binding on the appellee as the Lloyd-LaFollette Act was held by this court to be binding on the United States Government. In the Roth case this court held that his removal from his position was not in accordance with the law and that he should be restored to his position. In the present case appellant submits that



his removal was not in accordance with the By-Laws of the D.A.V. and therefore a verdict should have been directed for the appellant instead of against him.

## II

THE COURT ERRED IN CONSIDERING TESTIMONY OF  
THE NATIONAL JUDGE ADVOCATE WHO HAD NOT  
BEEN SWORN AS A WITNESS.

As has been stated before, the court ruled that the appellant was dropped from the rolls because he had not reported for work for a period of five months and that he did not come within the provisions requiring 30 days written notice. It is submitted that the only way the court could have reached this conclusion was through the statements made by Sylvester Hoffman, Esquire, National Judge Advocate of the D.A.V. (J.A. 21). The court heard unsworn testimony by Mr. Hoffman that he had played a great part in drafting the Constitution and By-Laws of the D.A.V. and that a National Service Officer's certification to appear before the Veterans Administration could be cancelled, and later reinstated. It should be noted that there is nothing in the Constitution and By-Laws which so provide. He further testified that the D.A.V. did not discharge the appellant but that appellant had run out of benefits such as sick leave and annual leave and then became an employee without pay and that he did not come back to work and offer his services. This testimony of Mr. Hoffman was not only improper but contrary to the legitimate testimony which had been adduced at the trial. It is clear from the records that the appellant at the time of the termination of his employment was too ill to work and the appellee was well aware of this (J.A. 13-16). The court conceded this fact (J.A. 22). The appellant contends that if the D.A.V. desired to discharge the appellant because of his ill health it had a right to do so, provided it did so in compliance with the procedures spelled out in the By-Laws of its corporation for discharge of employees.



As a further protection to employees with 5-year service the By-Laws of the corporation in paragraph 5, Article VII, provides that the employment of such a person shall not be terminated except upon a two-thirds vote of the National Executive Committee. This paragraph was specifically designed to protect five-year employees, such as the appellant, from discharge at the whim of his immediate supervisor and to give due consideration to the reasons for which the discharge of such an employee was sought. Hence we can see that the appellant was denied basic and fundamental rights afforded him by the By-Laws of the D.A.V. It is submitted that had his termination been submitted to the National Executive Committee they might well have been sympathetic toward him and given him favorable consideration due to the fact that his absence from work was caused by a severe physical ailment.

The appellant during his illness kept his employer informed as to his physical condition, both personally and through his wife (J.A. 13-16). He was a very ill man and his employer knew this to be a fact (J.A. 16). However, in spite of this knowledge and knowing that he intended to return to work when he became physically able to do so (J.A. 18), they terminated his employment without notice or warning to him.

### III

THE COURT ERRED IN DIRECTING A VERDICT FOR  
THE APPELLEE WITHOUT HEARING TESTIMONY  
PERTAINING TO APPELLANT'S CLAIM FOR ACCRUED  
ANNUAL AND SICK LEAVE.

In directing a verdict for the appellee, the court failed to give any consideration to the contention of the appellant that at the time of the termination of his employment he was entitled to 41 days accrued annual leave and 71 days accrued sick leave, totaling 121 days of leave in the amount of \$1,950.00. It is the contention of the appellant that if he had been properly credited with this leave he would have had a pay status beyond the period of August 1, 1955, when his recognition before



the Veterans Administration was withdrawn. The court rejected any testimony regarding this part of appellant's claim (J.A. 17).

The court's attention is directed to the appellee's pre-trial statement (J.A. 6) in which it is specifically set forth that the appellant while on sick leave which was exhausted on May 10, 1955, upon being interrogated as to when he expected to return to work, waited until August 1, 1955, at which time the appellee caused the plaintiff's accreditation with the Veterans Administration to be withdrawn. Here we see that there was clearly an issue of fact concerning the appellee's sick leave status and whether he was or was not owed money for accrued sick leave as prayed for in his complaint.

The court's ruling in this respect is, therefore, entirely without basis in law or fact.

### CONCLUSION

It is undisputed that the appellant's accreditation to appear before the Veterans Administration was withdrawn by the appellee. Under the provisions of the Constitution and By-Laws of the D.A.V. the employment of the appellant as a National Service Officer was thereby terminated. The appellant was not given prior notice or the opportunity to be heard concerning the termination of his employment as required by the Constitution and By-Laws of the D.A.V.

The appellant contends, therefore, that the evidence submitted by him and uncontradicted by the appellee clearly constituted a prima facie case entitling him to recovery and that the court erred in directing a verdict for the appellee.

Furthermore, it is likewise clear that there was a genuine issue of fact as to whether or not the appellant was entitled to accrued annual and sick leave benefits, which the court erroneously failed to take into consideration when directing a verdict for the appellee.



Wherefore, it is respectfully urged that the judgment of the trial court be reversed.

Respectfully submitted,

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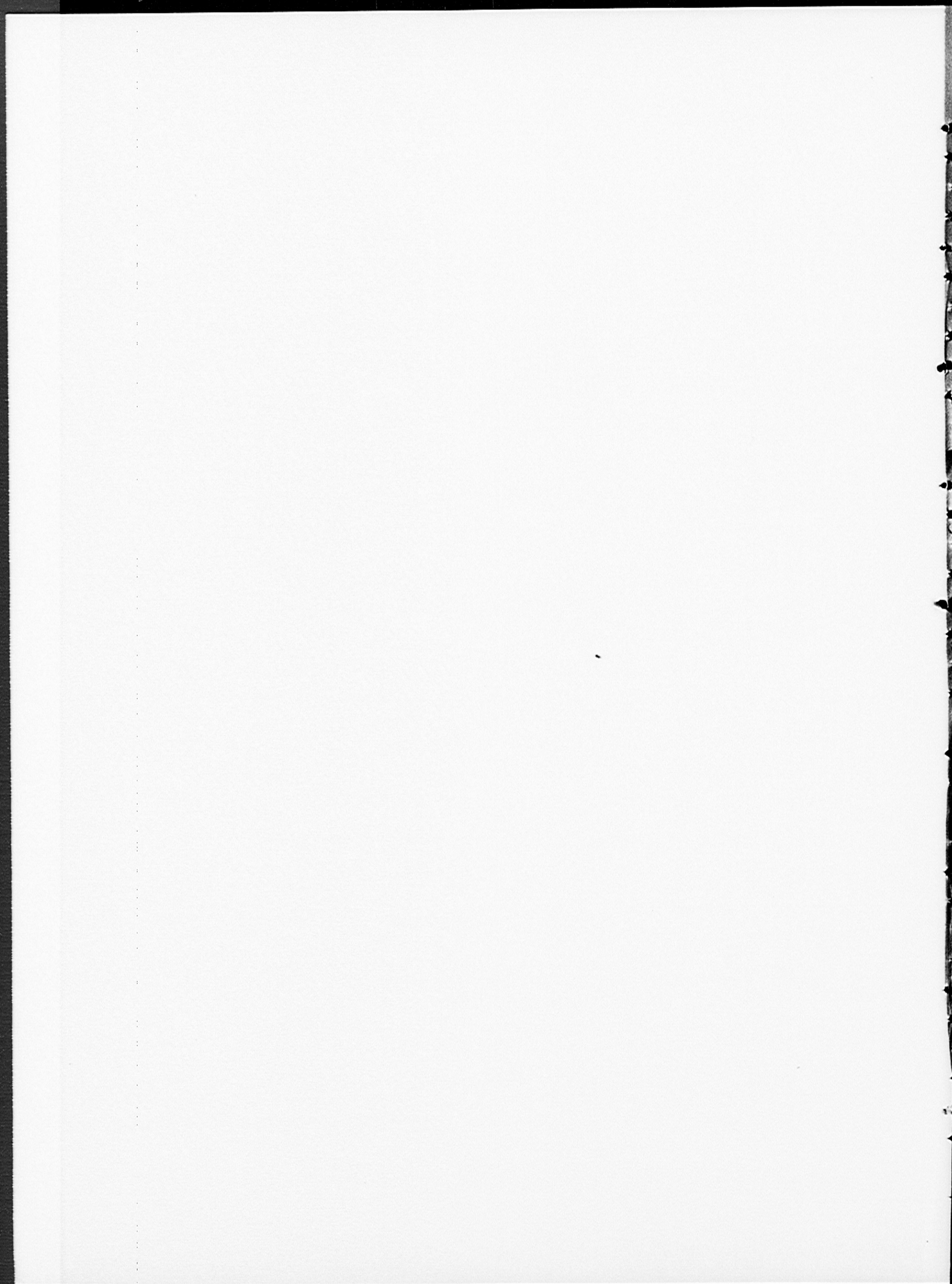


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| May 27 | Verdict and Judgment for deft. by direction of the Court. Holtzoff, J.                                    |
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June 12 P&A of deft. in opposition to pltfs. motion for a new trial.  
 June 13 Order overruling motion for new trial. Holtzoff, J.  
 June 17 Transcript of Proceedings; May 27, 1958.  
 July 11 Notice of appeal by pltff.  
 Aug. 18 Order extending time for filing designation of record on appeal to Sept. 10, 1958 and the time for docketing the record on appeal to and including October 9, 1958. Youngdahl, J.  
 Nov. 14 Application of pltff. for leave to proceed on appeal without prepayment of costs; P&A; Granted - Fiat. Holtzoff, J.  
 Dec. 2 Preliminary Record on Appeal Delivered to U. S. Court of Appeals.

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[ Filed August 8, 1956 ]

## COMPLAINT FOR BREACH OF CONTRACT

### First Count

1. Jurisdiction is based on the fact that it is a civil suit involving over \$3,000.00 exclusive of costs and interest.
2. Plaintiff is a resident of the District of Columbia. Defendant is a Corporation, chartered by Act of Congress; and maintains an office in the District of Columbia at 1701 18th Street, N. W., Washington, D.C.
3. In the latter part of 1944, plaintiff was urged by representatives of defendant to enter into an employment agreement with defendant for a career position as a service officer. In pursuance of said agreement, plaintiff, on January 1, 1945, entered Class II, Disabled American Veterans Training Program, at American University, Washington, D.C.
4. Following completion of this required training, plaintiff, pursuant to said agreement, was appointed a National Service Officer of defendant and thereafter served continuously with defendant as an employee and National Service Officer until on or about August 1, 1955. During said period, plaintiff was a member in good standing of the organization of the Disabled American Veterans as required by defendant of plaintiff as an employee.



5. On or about August 1, 1955, defendant, without prior notice to plaintiff, and contrary to the provisions of the National By-Laws of defendant then in force, which By-Laws set forth the terms and conditions relating to the employment and separation from employment of plaintiff and other National Service Officers and constituted part of the aforesaid agreement between the parties, wrongfully and unlawfully terminated plaintiff's employment with defendant.

6. As a result of defendant's unlawful act and breach of employment agreement, plaintiff suffered loss of rights and privileges accrued as a career employee of defendant, suffered great humiliation and embarrassment, and suffered great financial loss due both to his inability to obtain employment of a like nature and due to the wrongful disruption and termination of a career employment with defendant which caused great and unnecessary expense and loss of income and security to plaintiff.

Wherefore, plaintiff demands judgment against defendant in the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

#### Second Count

Plaintiff for his second cause of action alleges:

7. That he adopts the whole of paragraphs 1, 2, 3, and 4 of the First Count, above, as fully as if specifically repeated herein.

8. That during the period of his employ by defendant, plaintiff earned leave under the Disabled American Veterans Leave Policy as follows: six days annual leave and six days sick leave for the first year of employment; twelve days annual leave and twelve days sick leave for each year thereafter through the fifth year of employment; and eighteen days annual leave and eighteen days sick leave for each year after the fifth year of employment. That said Disabled American Veterans Leave Policy was applicable to all employees of defendant and was a part of the employment agreement between plaintiff and defendant.

9. That at the time of plaintiff's wrongful discharge from employment by defendant, there was earned by plaintiff and due and unpaid to him, forty-one days annual leave and seventy-one days sick leave, being



a total of one hundred twelve days leave.

10. That by reason of the wrongful computation by the defendant of plaintiff's accrued leave, plaintiff was placed on a leave without pay status for a period of about two and one-half months during a period of illness prior to his wrongful discharge.

Wherefore, plaintiff demands judgment against defendant in the sum of ONE THOUSAND NINE HUNDRED FIFTY DOLLARS (\$1,950.00), interest and costs.

/s/ W. Perry Doing  
Attorney for Plaintiff  
\* \* \*

Plaintiff demands trial by jury.

/s/ W. Perry Doing  
Attorney for Pltff.

---

[ Filed September 10, 1956 ]

#### ANSWER

1. The Defendant admits the allegations of paragraph one (1) of the complaint.

2. It admits the allegations of paragraph two (2).

3. It admits the allegations of paragraph three (3).

4. It admits so much of paragraph four (4) as states that following completion of this required training, Plaintiff, pursuant to said agreement, was appointed a National Service Officer of Defendant and thereafter served continuously with Defendant as an employee and National Service Officer; and that during said period, Plaintiff was a member in good standing of the Organization of the Disabled American Veterans as required by Defendant of Plaintiff as an employee. All other allegations contained in said paragraph four (4) are denied.

5. It denies the allegations of paragraph five (5).

6. It denies the allegations of paragraph six (6).

7. It admits that said Disabled American Veterans leave policy was applicable to all employees of Defendant and was a part of the



Employment Agreement between Plaintiff and Defendant. All other allegations contained in said paragraph eight (8) are denied.

8. It denies the allegations of paragraph nine (9).

9. It denies the allegations of paragraph ten (10).

10. The Defendant says that Plaintiff has failed to exhaust his internal, administrative remedies for redress of grievances within the framework of Defendant Organization, pursuant to, and as provided by Defendant's National Bylaws, prior to the institution of this action.

/s/ Fred W. Peel  
Attorney for the Defendant  
\* \* \*  
Washington, D. C.

/s/ Fred R. Bristol  
Attorney for the Defendant  
5555 Ridge Avenue  
Cincinnati 13, Ohio

[Certificate of Service]

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[Filed February 10, 1958]

### PRETRIAL PROCEEDINGS

#### STATEMENT OF NATURE OF CASE:

The plaintiff alleges breach of contract and ensuing damage arising out of a contract of employment with the defendant, a federally chartered Veterans' organization.

There was no written contract. The employment arrangement, according to the plaintiff, arising out of an oral agreement whereby the plaintiff was engaged in a career position as a service officer in so-called Class II disabled American Veterans Training Program at American University, this City, in the latter part of 1944. At the completion of this training, plaintiff states that by virtue of this oral agreement he was appointed as a National Service Officer of the defendant until August 1, 1955. On or about this time in violation of the terms of the contract of employment his position with the defendant was terminated, as a consequence of which he suffered loss of such rights and



privileges as had accrued, including also financial loss made up of \$3900 loss of salary, approximating to date \$9750, annual Christmas bonus, life insurance, retirement, leave, and other fringe benefits.

The plaintiff also claims compensatory damage in addition by being forced in the circumstances to leave his apartment and to move into a cheaper one.

The defendant admits the plaintiff was an employee under an oral agreement, denies discharge, and any responsibility in the nature of damages.

The defendant specifically states the plaintiff went on sick leave in March of 1955 and remained in such status, except for a day or two; and upon being asked when he expected to return to work, said he did not know. His sick leave was exhausted May 10, 1955, and upon being interrogated as to when he expected to return and waiting until August 1, the defendant caused the plaintiff's accreditation with the Veterans Administration to be withdrawn.

Stipulations. Constitution and by-laws of Disabled American Veterans, Inc., and other related documents which are relevant and probative of the issue involved may be offered without formal proof subject to the usual objections.

/s/ Matthew F. McGuire  
Judge

/s/ John J. Schlick  
Atty. for Deft.

/s/ W. Perry Doing  
Atty. for Pltf.

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[ Filed June 17, 1958 ]

# EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.  
Tuesday, May 27, 1958

The above-entitled cause came on for trial on the merits at 11:25 o'clock a.m., before JUDGE ALEXANDER HOLTZOFF and a jury,



pursuant to adjournment of May 26, 1958.

APPEARANCES:

ROBERT T. SMITH, ESQ., and W. PERRY DOING, ESQ.,

Appearing for Plaintiff.

JOHN J. SCHLICK, ESQ., and SYLVESTER HOFFMAN, ESQ.,

Appearing for Defendant.

\* \* \* \*

5

EARL B. WRIGHT

was called as a witness in his own behalf and having been duly sworn,  
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOING:

Q. If the Court please, Mr. Wright, will you state your full name,  
occupation and home address, please? A. My name is Earl B. Wright.  
I live at 4212 - 28th Street, Mount Rainier, Maryland. I am an employ-  
ment counsellor.

Q. Are you the plaintiff in this case? A. Yes, sir.

\* \* \* \*

7

Q. Did you make application for employment with the Disabled  
American Veterans? A. I did and it had to be countersigned --

THE COURT: No; just answer questions and then stop.

THE WITNESS: I did.

\* \* \* \*

BY MR. DOING:

Q. Was that application accepted? A. Yes, sir.

Q. As a result of the acceptance of that application, were you re-  
quired to undergo any training? A. Yes, sir.

Q. Where did you take such training? A. At the American Uni-  
versity, Washington, D. C.

Q. And when did you take such training? A. January 3, 1945 to  
May 20, 1945.

8

Q. And what was the position for which you applied and were  
accepted? A. National Service Officer of the DAV.

\* \* \* \*



21 Q. After you entered into employment with the Disabled American Veterans as National Service Officer, how long did you remain in their employment? A. I remained continuously until August 1, 1955.

\* \* \* \*

22 Q. And what occurred on or about August 1, 1955 that terminated this employment? A. My accreditation with the Veterans Administration was canceled.

\* \* \* \*

MR. DOING: If the Court please, we would like to offer the constitution and bylaws of this organization which were stipulated at pre-trial.

\* \* \* \*

THE COURT: They are admitted in evidence.

\* \* \* \*

24 MR. DOING: And I am referring specifically to Article 7, Section 2, paragraphs 2 and 3.

THE COURT: Very well. Now, you may read those paragraphs into the record, if you wish, so that the jury may hear them.

MR. DOING: Thank you, your Honor.

"Article 7, Section 1, paragraph 4 provides that no paid employee of the National Organization, while a member in good standing of the Disabled American Veterans or of its Women's Auxiliary and who has been so employed continuously for a period of five years shall be discharged or his employment terminated involuntarily except upon a personal hearing upon thirty days' written notice before the National Executive Committee and the approval of that committee by a two-thirds vote, which action shall be final. The National Commander may suspend any such employee for cause pending the hearing.

"All employees shall be subject to Article 12 of these by-laws."

25 "The National Commander may suspend any appointed paid or non-paid officer or employee without first preferring charges for a period within his discretion of not to exceed 90 days to enable the Commander to investigate them. The salary, if any, of such suspended officer or



employee shall be paid to him during such suspension. Such suspension shall terminate automatically at the end of 90 days unless charges are filed, in which case the provisions relating to suspension after charges are filed shall become operative."

Article 7, Section 2, paragraph 2 provides:

"The term of employment of a national service officer shall not commence until he is certified by the Veterans Administration and shall continue only so long as such certification is in effect."

Paragraph 3 provides, in the same section:

"No National Service Officer shall be removed, discharged or transferred except for cause after reasonable notice specifying the reasons therefor. Subject to provisions of Section 1," this refers to paragraph 5 of this article but it has been agreed by counsel that it is erroneous and refers to paragraph 4 which is the provision I just read a moment ago.

THE COURT: You are offering this in evidence?

25 MR. DOING: We do, your Honor.

THE COURT: It may be admitted. Hand the exhibit to the clerk. Proceed.

BY MR. DOING:

Q. On August 1, 1955, Mr. Wright, were you a member of the Disabled American Veterans organization? A. I was.

Q. Were you a member in good standing? A. I was.

Q. Did you receive any notice of any kind indicating that your employment with the DAV had been terminated at that time? A. I received a letter transmitted to me by Mr. Leslie C. Forsythe which was a letter from the Solicitor of the Veterans Administration --

\* \* \* \*

26 MR. SCHLICK: I have no objection to the letter, your Honor, but the attachment.

THE COURT: Very well, let it be admitted.

(Plaintiff's exhibit 3 is received in evidence.)

\* \* \* \*



MR. DOING: This letter reads as follows, dated August 4, 1955.

27

"OFFICE OF GENERAL COUNSEL

"Mr. Cicero F. Hogan

"National Director of Claims

"Disabled American Veterans,

"1701 - 18th Street, Northwest,

"Washington 9, D. C.

"Dear Mr. Hogan:

"In accordance with your request of August 1, 1955, the recognition granted to Mr. Earl B. Wright as an accredited representative of the Disabled American Veterans in the presentation of claims before the Veterans Administration has been terminated as of this date. A copy of this letter has been forwarded to Mr. Wright.

("signed)

"Very truly yours,

Edward E. Odum,

"General Counsel."

\*

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33

THE COURT: Very well. Let me see. In the pre-trial statement it is admitted that the plaintiff was an employee of the defendant, and that is all it admits. It does not state that he was a National Service Officer. It does not state what his salary was supposed to be or anything of that sort. In your paragraph 4 of the complaint you allege that the plaintiff was appointed a national service officer of the defendant

34

and thereafter served continuously as such until on or about August 1, 1955.

Now, the Answer admits that the plaintiff was appointed National Service Officer of the defendant. Well, then, you have an admission. It does not admit the date, but you can rely on that admission. I wish you had called the Court's attention to the fact earlier. And, also it says "and thereafter served continuously with defendant as an employee as National Service Officer." It does not admit any particular dates.

Well, then, you have an admission that he was a National Service



Officer. Very well. Go on from there.

\* \* \* \*

BY MR. DOING:

Q. Mr. Wright, I believe you have testified that you served continuously as an employee with the DAV from June 1, 1946 until August 1, 1955, is that correct? A. That is correct.

Q. And on or about August 1, 1955 you received a copy of a letter, you say, from the Solicitor of the Veterans Administration indicating that your accreditation had been withdrawn, is that correct? A. That is correct.

Q. Did you thereafter receive any other written communication  
35 indicating that your employment with the DAV had been terminated?  
A. I received a memorandum from National Headquarters of the DAV that my insurance had been terminated.

\* \* \* \*

Q. I will hand you this paper and ask you if this is the paper to which you refer? A. It is.

MR. DOING: If the Court please, we offer this in evidence.

THE COURT: It may be admitted.

\* \* \* \*

MR. DOING: Thank you.

36 It is a memorandum addressed to Mr. Earl B. Wright, from the  
Accounting Department of the Disabled American Veterans dated  
August 12, 1955.

"This is to advise that your Blue Cross and Blue Shield Contracts will be dropped from the Disabled American Veterans Group effective August 25, 1955.

"You may continue your coverage by paying direct to Blue Cross. Hospital Care Corporation will bill you on a quarterly basis after we have notified them to drop your contracts from our group. After you have made your first quarterly payment, they will advise you regarding transferring the contracts to the Blue Cross Plan in the area in which you reside.



"Your Metropolitan Group Insurance will be canceled effective August 1, 1955.

"Enclosed is a Form 'G-1507' to be used in the event you wish to apply to the Metropolitan for an individual policy."

Accompanying this is a small notice addressed to Mr. Wright signed by the Disabled American Veterans in typewritten form bearing the date of August 12, 1955, and also advising him that his Group Life Insurance was discontinued on August 1, 1955 and he was entitled to apply for an individual policy of life insurance issued by the Metropolitan Life Insurance Company provided he does so within 31 days of the discontinuance date mentioned above.

Would you mark these for identification, please?

DEPUTY CLERK: Plaintiff's Exhibits 5, 6, 7 and 8 for identification.

\* \* \* \*

MR. SCHLICK: No objection.

MR. DOING: We would like to offer them into evidence, if the Court please.

THE COURT: Very well. Receive them.

38 (Plaintiff's Exhibits 5, 6, 7, 8 and 9 were received in evidence.)

\* \* \* \*

39 MR. DOING: We offer into evidence the following documents:  
Plaintiff's Exhibit No. 5, a memorandum to Accounting, dated August 9, 1955, reference "Wright, Earl," signed Ruth E. Meyer.

As Plaintiff's Exhibit 6, a memorandum to Mr. C. Leslie Forsythe, dated September 8, 1955, signed Vivian D. Corby.

Exhibit 7, a letter from the Office of the General Counsel, Veterans Administration, Washington, D. C., dated August 4, 1955, addressed to Mr. Cicero F. Hogan, National Director of Claims, Disabled American Veterans, signed by Edward E. Odum, General Counsel.

\* \* \* \*

MR. DOING: Plaintiff's Exhibit 8, a letter dated August 1, 1955,



"Reference Earl B. Wright" addressed to Mr. E. E. Odum, General  
40 Counsel, Veterans Administration, signed by Cicero F. Hogan,  
National Director of Claims.

THE COURT: They may be admitted. Let me see those.

MR. DOING: Plaintiff's Exhibit 9, a copy of the plaintiff's employment record with the defendant DAV.

THE COURT: It may be admitted.

\* \* \* \*

BY MR. DOING:

Q. During the period of March 1, 1955 to August 4, 1955, did you  
at any time notify the Disabled American Veterans Administration that  
you would not return to work for that organization? A. I never at no  
41 time indicated my unwillingness to return to work.

Q. Subsequent to your receipt of copy of the letter from Mr.  
Odum addressed to Mr. Hogan withdrawing your accreditation and the  
memorandums from the DAV headquarters cancelling your insurance  
coverage, did you at any time acquiesce or agree to the termination of  
this employment? A. I did not.

Q. Did you during the period March 1, 1955 to August 4, 1955  
keep in contact with the Washington headquarters and National Head-  
quarters of the DAV with reference to your returning to work? A. I  
did --

THE COURT: I am going to exclude that as a conclusion. I do not  
know what is meant by "keeping in contact." I think you had better ask  
specific questions.

\* \* \* \*

BY MR. DOING:

Q. During the period of your absence from work March 1, 1955  
to August 4, 1955 --

THE COURT: Well, has he testified that he was absent from work  
from March to August?

MR. DOING: Yes, I believe he has, your Honor.

\* \* \* \*



42

BY MR. DOING:

Q. Did you make application for insurance benefits? A. I did.

Q. To whom? A. I made them to the Metropolitan Insurance Company through the employer.

Q. Were you covered by that insurance company as an employee of the DAV? A. I was.

Q. What was the outcome or result of your application for these benefits? A. The Metropolitan Insurance paid me the maximum benefits for total disability.

Q. In connection with this application, was it necessary or incumbent upon you to furnish any medical evidence as to your physical condition? A. Yes, sir.

Q. Did you furnish such information? A. I did.

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43

Q. Mr. Wright, on August 1, 1955, were you working on the job?

A. What date was that?

Q. August 1, 1955? A. No, sir, I had been ill since March 1.

Q. What was the matter with you? A. Well, I had a serious back ailment.

Q. Were you under the care and treatment of a doctor? A. Yes, sir.

Q. Who was this doctor? A. A Veterans Administration physician, Dr. Mendelsohn.

Q. What was the nature of this illness? A. He diagnosed it as a herniated disk.

Q. How, if at all, did it affect your ability to work? A. I was in continual pain. I lost about 35 pounds. I could not sleep, I could not walk and I could not sit up.

Q. Was this condition in existence on August 1, 1955? A. It was.

44 Q. How long thereafter did it continue? A. Until about the latter part of November of 1955.

Q. Was your employer aware of this condition? A. He was.

Q. How was he so informed? A. When I filed my application for



Metropolitan insurance, I furnished to them directly the written application on which the doctor's statement was included.

Q. When you became ill on March 1, 1955, did you go on leave?

A. Yes, sir.

Q. What kind of leave? A. Sick leave.

Q. Were you on sick leave as of August 1, 1955? A. According to their determinations, I was on leave without pay at that time.

Q. Do you recall how long you were on sick leave between that period -- A. Well, I used the sick leave and what annual leave that they allowed me, and that expired approximately May 10, 1955, and subsequent to that date I was on leave without pay.

\* \* \* \*

45 Q. When you made application for benefits to the Metropolitan Life Insurance Co., was the medical information furnished by you made available likewise to your employer? A. Yes, sir. In fact, he informed me that, if it was satisfactory to the Metropolitan Insurance Company, it was satisfactory to the DAV, and he said he would inform the National Headquarters at Cincinnati of such.

Q. Who is "he"? A. Mr. Hogan.

Q. And who was Mr. Hogan at that time? A. He was my supervisor, National Director of Claims.

Q. During this period of illness, did you keep your employer informed as to your progress? A. To the best of my ability.

Q. How did you do so? A. By personal contacts and by my wife.

\* \* \* \*

Q. What type of medical treatment, if any, did you receive during this period? A. Well, the Veterans Administration physician gave me some pain killers, I suppose you would call them, and he recommended I take bed rest upon a flat board and stay off my feet and he said either  
46 do that or I would have to be hospitalized or the disk removed and when I was home I took light treatment and I had a heating pad which I used regularly.

Q. Were any X-rays taken? A. The Veterans Administration



took 11 X-rays of my spine.

Q. Did anyone else on your behalf advise your employer as to the progress in your case? A. Yes, my wife did.

\* \* \* \*

Q. Did you ever receive any kind of notification from your employer, the DAV, that they intended to terminate your employment?

A. No information whatsoever prior to August 1, 1955.

Q. Had you ever informed them at any time that you did not intend to return? A. No, sir.

MR. DOING: Would you mark this for identification, please.

(Plaintiff's Exhibit No. 10 was  
marked for identification.)

MR. SCHLICK: No objections.

MR. DOING: If the Court please, we offer this collection of documents as evidence. I will identify them as follows: They are all  
47 official files from the Metropolitan Life Insurance Company with respect to the claim for insurance benefits paid by them to Earl Wright while an employee of the DAV. A telegram --

THE COURT: How is that relevant?

MR. DOING: If the Court please, these show that he drew 13 weeks' disability compensation and there is medical evidence here to support this claim.

THE COURT: How is that relevant?

MR. DOING: If the Court please, this shows the defendant was out sick during that period.

THE COURT: Well, is that denied?

MR. SCHLICK: No, your Honor.

THE COURT: The defendant does not deny the plaintiff was sick.

MR. DOING: Very well.

A short while ago I read certain provisions from the by-laws of the DAV constitution. Do you recall my reading those provisions?

THE WITNESS: Yes, sir.

BY MR. DOING:

Q. Were they in effect on August 1, 1955? A. They were.



48 Q. Were they in effect in the year 1946? A. They were.

Q. Were they in effect for the period 1946 through August, 1955?  
A. They were.

Q. Were you ever afforded any hearing by the Disabled American Veterans with reference to your separation from their employ?  
A. I was not.

Q. Do you also have a claim against the DAV with respect to accrued leave for which you have not been paid? A. Yes, sir.

Q. Will you tell us upon which that is based?

THE COURT: Oh, no, that goes to the item of measure of damages.

MR. DOING: Very well, your Honor.

If the Court please, that completes our direct. We will reserve the right to examine the witness on damages.

\* \* \* \*

#### CROSS EXAMINATION

BY MR. SCHLICK:

\* \* \* \*

49 Q. Did the Director of Claims or anyone else in authority at the DAV ever tell you you were discharged? A. He did not, himself, no, sir.

THE COURT: Well, did anybody else?

THE WITNESS: When I was notified, your Honor, that my insurance and--

THE COURT: No, did anyone from the DAV organization ever tell you that you were discharged from your employment as National Service Officer?

50 THE WITNESS: Your Honor, there have been people told me and there are people who made contacts with them. For instance, my realtor where I rented, they called them and told them I was no longer employed.

THE COURT: No, one moment. Did anyone tell you? That is the question you were asked several minutes ago and you have not answered it yet. Did anyone connected with the DAV organization ever tell you



that you were discharged?

THE WITNESS: Not directly.

THE COURT: Very well.

BY MR. SCHLICK:

Q. Mr. Wright, who hired you in the DAV?

\* \* \* \*

51 THE WITNESS: Well, Dowell V. Walker.

THE COURT: And what was his position?

THE WITNESS: He was the National Commander.

\* \* \* \*

BY MR. SCHLICK:

52 Q. Mr. Wright, who was National Commander when you claim that you were fired? A. Alfred English.

Q. Did Mr. English ever tell you that your services were no longer needed or in any way indicate to you that you should be terminated from your employment? A. No, because his term of office expired in August.

\* \* \* \*

Q. Did you ever, after you became available for work, ask to return to work or in any way make yourself available to the Director of Claims of the DAV? A. After my service was terminated, I put it in the hands of my counsel.

\* \* \* \*

53 THE WITNESS: My attorney communicated my intentions to return to work.

\* \* \* \*

THE COURT: Oh, no; I am going to strike that as irrelevant. Are you trying to prove his prima facie case for him?

MR. SCHLICK: No.

BY MR. SCHLICK:

Q. Mr. Wright, when did you become available for work?

THE COURT: I think that is all irrelevant unless you want to carry his burden of proof.



MR. SCHLICK: I don't want to carry his burden of proof.

THE COURT: Well, that is what you are trying to do apparently.

\* \* \* \*

54

# REDIRECT EXAMINATION

BY MR. DOING:

\* \* \* \*

Q. In or about November of 1955, were you ready, willing and able to return to work with the DAV? A. Yes, sir.

\* \* \* \*

55

# RECROSS EXAMINATION

BY MR. SCHLICK:

Q. Mr. Wright, you testified in November you were ready, willing and able to return to work. Now, did you make yourself available in November to the DAV?

THE COURT: I think you ought to make your question more specific. "Make yourself available" is a conclusion.

MR. SCHLICK: Very well.

56

BY MR. SCHLICK:

Q. Did you, in November, when you became ready, willing and able to work, report to Captain Hogan or anyone in authority at the DAV and offer your services? A. I had already put it in the hands of my attorney.

THE COURT: What was your answer?

THE WITNESS: I had already put it in the hands of the attorney, your Honor.

THE COURT: No, will you answer the question, please.

THE WITNESS: Well, I put it in the hands of the attorney.

THE COURT: No, that is not the answer to the question. I am going to have the reporter read the question.

(The reporter read the pending question again.)

THE WITNESS: No, sir.

\* \* \* \*

57

MR. SMITH: If your Honor please, I think that is our case as far



as his employment, the termination of his employment is concerned.

THE COURT: In other words, you rest on the issue of liability subject to proof of damages?

MR. SMITH: Yes.

MR. SCHLICK: I am going to move at this time for a directed verdict on the issue of liability.

THE COURT: The Court will hear you on behalf of the plaintiff, gentlemen, if you wish to say anything.

MR. SMITH: Your Honor, I wish to call your attention to the constitution and by-laws which provided that a service officer's employment is terminated upon --

THE COURT: Let me have the exhibit, please, Mrs. Burroughs. Go ahead, Mr. Smith.

MR. SMITH: -- is terminated upon his accreditation being withdrawn from the Veterans Administration.

58

\*

\*

\*

\*

THE COURT: "The term of employment of a National Service Officer shall not commence until he is certified by the Veterans Administration and shall continue only so long as such certification is in effect."

That is what you rely on?

MR. SMITH: Yes, your Honor.

THE COURT: What do you say about that?

MR. SCHLICK: We say he was a National Service Officer, an employee. He so stated in his employment. He can be an employee without acting as a National Service Officer. The certificate can be withdrawn and be reinstated again.

59

THE COURT: And what?

MR. SCHLICK: And be reinstated. That does not terminate his employment as such.

THE COURT: "The term of employment of a National Service Officer shall continue only so long as such certification is in effect," is what the by-laws say.



What do you say about that?

\* \* \* \*

MR. SCHLICK: Maybe Mr. Hoffman can explain it because he wrote these by-laws.

MR. HOFFMAN: There is an earlier section that states that after a person has been a member for five years, that he shall not be discharged without trial or thirty days notice.

60 Our position is that it is necessary for a person who thinks that he has been wrongfully discharged--

THE COURT: Necessary for what?

MR. HOFFMAN: -- necessary that he initiate the hearing. He testified he did not ask for any hearing. There is another section in the book that states that no member shall bring any action in any court of law unless he has first exhausted his administrative remedies. That is part of his employment contract. It is a condition precedent but he never did it.

THE COURT: By the way, why didn't you bring charges and give him a hearing?

MR. HOFFMAN: Because he got sick and never came back and said I want to work.

THE COURT: I see.

MR. HOFFMAN: We did not discharge him. He ran out of all of these benefits, the sick leave, the annual leave, and then he was an employee without pay.

THE COURT: Well, it seems to me, Mr. Doing, and Mr. Smith, that it was his duty, if he claimed that he was illegally discharged, to report for work and offer his services. I think that is the duty of any employee who claims he is illegally discharged. I do not think he has got a cause of action.

\* \* \* \*

61 THE COURT: No, this man did not show up for work from the first of March until the first of August. Of course it is very unfortunate that he was ill. His leave expired. Were they expected to keep him on



the rolls permanently?

MR. SMITH: If your Honor please, they knew he was ill.

62 THE COURT: Would you mind answering my question? What were they to do?

MR. SMITH: They could have notified him that unless he could report by a certain time, that they were going to take steps under the constitution to remove him for cause, to-wit, that he was too ill to work, and they could no longer afford to carry him on the rolls.

THE COURT: Well, I am going to direct a verdict for the defendant. I do not think there is a cause of action.

#### RULING OF THE COURT

THE COURT: In this case an answer of the defendant to the complaint admits that the plaintiff was appointed a National Services Officer, although no date is given in the defendant's answer. These details were supplied by the plaintiff's testimony to the effect that he became National Service Officer on June 1, 1946 and that he continued working as such until March, 1955. In March, 1955, he became ill and was continuously ill, so that he was unable to work again until the following November, according to his testimony.

There is no direct proof that he was ever discharged, although there is evidence in the record that he was taken off the pay roll and his credentials were withdrawn as of August 1, 1955.

63 The Plaintiff claims that he was entitled to a hearing before being removed and that such hearing had to be on thirty days' written notice.

However, he was not removed within the meaning of that provision. He was dropped from the rolls because he had not reported for work for a period of about five months and his sick leave and annual leave had apparently expired.

There was no obligation on the part of the defendant to keep the plaintiff on the rolls indefinitely when he was not reporting for work.

Under those circumstances, the Court is of the opinion that no breach on the part of the defendant has been shown.

But, there is another circumstance which bars the plaintiff from



asserting any cause of action. He testified that he became able, ready and willing to go back to work in November of 1955. However, he testified that he made no effort to report for work or to offer his services or to go on with his employment.

In the light of all of these considerations, the Court is of the opinion that on the basis of the evidence introduced in behalf of the  
64 plaintiff, the plaintiff has established no cause of action and therefore the Court will direct a verdict in favor of the defendant.

DEPUTY CLERK: Will the twelve regular jurors please rise, just the first twelve?

Members of the jury, your verdict in this case is for the defendant by the direction of the Court and that is your verdict, so say you each and all.

All jurors please return to the jury lounge, all jurors, please.

\* \* \* \*

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[ Filed July 11, 1958 ]

#### NOTICE OF APPEAL

Notice is hereby given this 11th day of July, 1958, that Earl B. Wright, plaintiff in the above cause, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of May, 1958 in favor of Disabled American Veterans, a corporation, defendant, against said Earl B. Wright.

/s/ W. Perry Doing  
Attorney for the Plaintiff

\* \* \* \*

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[ Filed December 29, 1958 ]

August 4, 1955

Office of General Counsel

Mr. Cicero F. Hogan  
National Director of Claims  
Disabled American Veterans  
1701 18th Street, N. W.  
Washington 9, D. C.

Dear Mr. Hogan:

In accordance with your request of August 1, 1955, the recognition granted to Mr. Earl B. Wright as an accredited representative of the Disabled American Veterans in the presentation of claims before the Veterans Administration has been terminated as of this date.

A copy of this letter has been forwarded to Mr. Wright.

Very truly yours,  
EDWARD E. ODOM  
General Counsel

[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 4DISABLED AMERICAN VETERANS

|                             |                   |
|-----------------------------|-------------------|
| Memo to Mr. Earl B. Wright  | From Acctg. Dept. |
| 3352 Chillum Road, Apt. 101 | ad                |
|                             | 8/12/55           |

This is to advise that your Blue Cross and Blue Shield contracts will be dropped from the DAV group effective August 25, 1955. You may continue your coverage by paying direct to Blue Cross. Hospital Care Corporation will bill you on a quarterly basis after we have notified them to drop your contracts from our group. After you have made your first quarterly payment they will advise you regarding transferring the contracts to the Blue Cross plan in the area in which you reside.



Your Metropolitan Group insurance will be cancelled effective August 1, 1955. Enclosed is a Form G. 1507 to be used in the event you wish to apply to Metropolitan for an individual policy.

---

Your Group Life insurance was discontinued on August 1, 1955 and you are entitled to apply for an individual policy of Life insurance issued by the Metropolitan Life Insurance Company (except Term insurance) provided that you apply for it within 31 days from the discontinuance date mentioned above.

The individual policy will be issued without medical examination and in accordance with the provisions set forth in your Group insurance certificate. The application may be made to any Office of the Metropolitan Life Insurance Company, or to the Group Division, Metropolitan Life Insurance Company, 1 Madison Avenue, New York 10, N. Y.

Very truly yours,

Disabled American Veterans  
(Name of Employer)

---

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[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 5

August 9, 1955

MEMORANDUM TO ACCOUNTING:

Re: Wright, Earl

Discontinue Wright's benefits if any are being continued at the present time, since he is no longer on the payroll.

Ruth E. Meyer

---



[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 6

September 8, 1955

MEMORANDUM TO MR. C. LESLIE FORSYTH:

Re: Wright, Earl

It will not be necessary for you to submit further reports on the leave of the above captioned as his employment has been terminated.

Vivian D. Corbly  
National Adjutant

c;rem

[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 7

VETERANS ADMINISTRATION  
Washington 25, D.C.

Office of General Counsel

August 4, 1955

[Received Aug. 8, 1955  
Director of Claims, DAV]

Your File Reference:

In Reply Refer To: 2D

Mr. Cicero F. Hogan  
National Director of Claims  
Disabled American Veterans  
1701 18th Street, N. W.  
Washington 9, D. C.

Dear Mr. Hogan:

In accordance with your request of August 1, 1955, the recognition granted to Mr. Earl B. Wright as an accredited representative of the Disabled American Veterans in the presentation of claims before the Veterans Administration has been terminated as of this date.

A copy of this letter has been forwarded to Mr. Wright.

Very truly yours,  
/s/ Edward E. Odom  
General Counsel



[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 8

## DISABLED AMERICAN VETERANS

\* \* \*

August 1, 1955

Earl B. Wright  
DAV Nat'l. Service Officer  
3352 Chillum Road  
Mt. Rainier, MarylandMr. E.E. Odom  
General Counsel  
Veterans Administration  
Washington 25, D. C.

Dear Mr. Odom:

It is respectfully requested that the recognition extended to Mr. Earl B. Wright as an accredited representative of the Disabled American Veterans be cancelled as of this date.

Sincerely,

CICERO F. HOGAN  
National Director of Claims

cc: Mr. Corbly

[ Received August 8, 1955  
D.A.V. National Hdqrs. ]

[ Filed December 29, 1958 ]

PLAINTIFF'S  
EXHIBIT 9

Social Security No. 496 - 16 - 5770

Business Address: V. A. Regional  
Office, Lincoln, Nebraska

\* \* \*

Name

WRIGHT, EARL B.

Street

2110 R. St.

City

Lincoln, Neb.

PARTIAL LIFE

Age: 26

Birth Date: Dec. 19, 1921

Birthplace: Lebanon, Mo.

Sex: M

Race: W

Married: [X]



## EDUCATION

| <u>No. of Years</u> | <u>Name of School and Address</u> |
|---------------------|-----------------------------------|
| 2                   | Lebanon High School--Lebanon, Mo. |

## EMPLOYMENT RECORD

\* \* \* \* \*

## MILITARY SERVICE

Outfit: (Btry "B" 7th C.A.) (20th M.P. Co.)  
 (Btry "M" 4th C.A.) (Co. "A" 76th M.P.)

Enlisted or date inducted: Dec. 29, 1939 Discharge date: August 12, 1942

Disability: Chest

Department: SERVICE Occupation: SERVICE OFFICER

Group Insurance #: 391 Date: 12/1/46 Life: \$4,000.00

Weekly Benefit: \$21.00

Hospital care-type of contract: F

Doctors Plan - Type of Contract: F

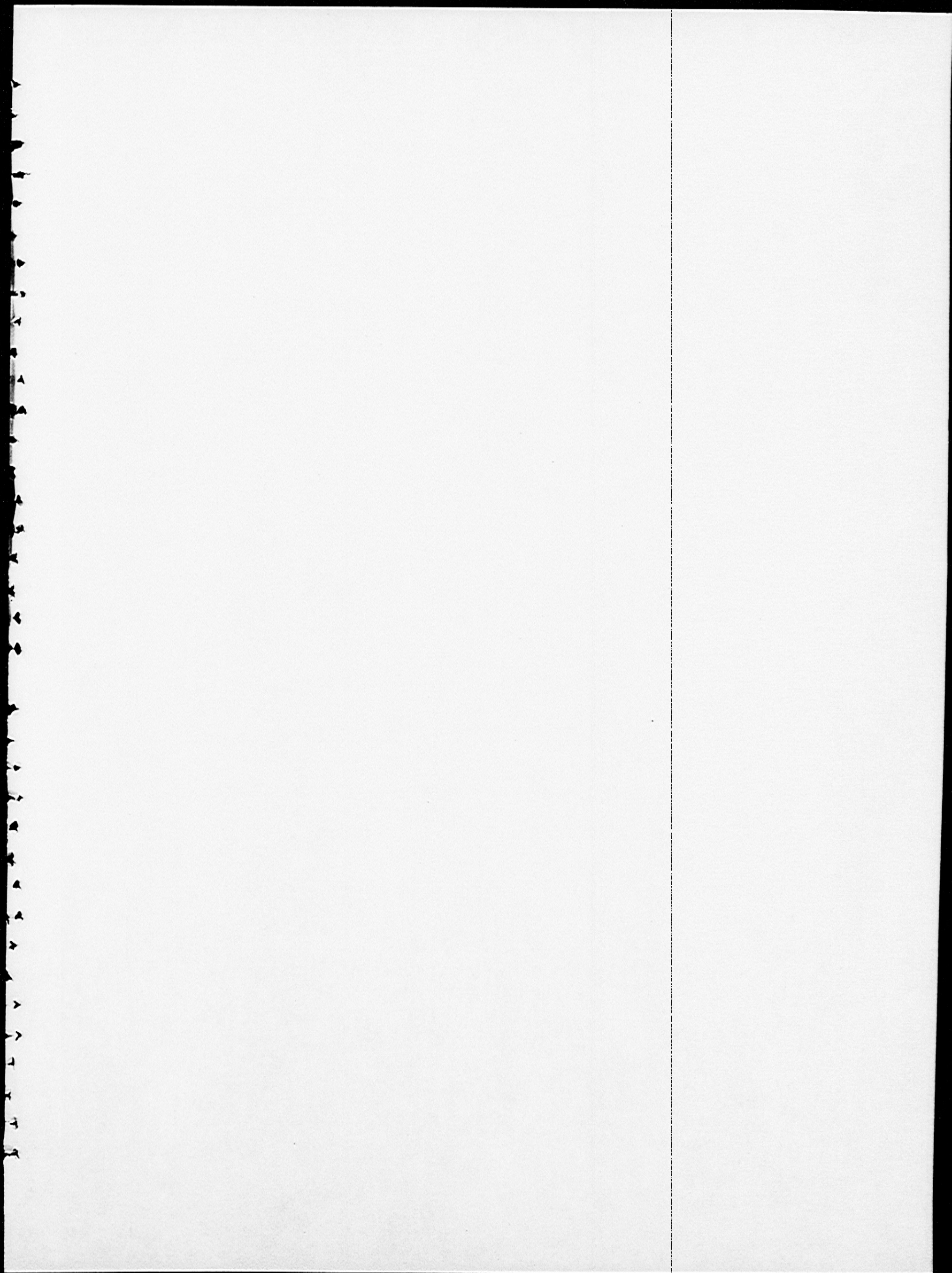
Retirement Plan Cert. #182

\* \* \* \* \*

| <u>Recap. of Employees Salary</u> |               |              |              | <u>Matriculated 1-2-45</u>                               | <u>General Remarks</u> |
|-----------------------------------|---------------|--------------|--------------|----------------------------------------------------------|------------------------|
| <u>Year</u>                       | <u>Salary</u> | <u>Bonus</u> | <u>Total</u> | <u>Graduated Class II, American University (5-21-45)</u> |                        |
| 1945                              | (trainee)     |              | 545.00       | First period: Kansas City, Mo. Arch M. Hale              |                        |
| 1946                              | "             |              | 605.00       | Second period: Lincoln, Nebraska S.S.O. Ivan D. Marsh    |                        |
| 1946                              | 1400.00       | 20.00        | 1420.00      | Third period: Remained in Lincoln In charge              |                        |
| 1947                              | 2400.00       | 240.00       | 2640.00      |                                                          |                        |
| 1948                              | 2450.02       | 490.00       | 2940.02      | REHABILITATED 6-1-46, Lincoln, Neb. In charge            |                        |
| 1949                              | 2724.96       | 545.00       | 3269.96      | \$2400 plus 10%                                          |                        |
| 1950                              | 2750.00       | 550.00       | 3300.00      |                                                          |                        |

10/1/48 \$2,600 base, plus 20% bonus.  
 \$2750.00 at N. F. C. meeting 2/49 at Cinti effective 3/1/49  
 N. F. C. mtg. 12/50: \$100 inc. & bonus incl. in base pay \$3420 eff. 1/1/51 plus exp. allow. of \$200 eff. 10/1/50  
 Relieved of duties, Lincoln, Nebr. 10/9/51 - ordered to Wash., D. C. Reported here 1/2/52 - assigned Wash. Reg. Ofc.  
 Assigned to 1701 - 9/52 (VB&E) 2/1/53 inc. \$3723.20 exp. allow. \$50. Went on sick lv. 3/1/55 - lwop 4/27/55 Recognition cancelled 8/1/55







BRIEF FOR APPELLEE

---

IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 14,827**

---

EARL B. WRIGHT, *Appellant*

v.

DISABLED AMERICAN VETERANS,  
a corporation, *Appellee*

---

Appeal from the United States District Court for the  
District of Columbia

---

JOHN J. SCHLICK  
918 - 16th Street, N.W.  
Washington 6, D. C.  
*Counsel for Appellee*

*Of Counsel:*

SYLVESTER HOFFMANN, ESQUIRE  
810 Chester Williams Building  
Los Angeles 13, California

FRED R. BRISTOL  
General Counsel  
Disabled American Veterans  
5555 Ridge Avenue  
Cincinnati 13, Ohio

*United States Court of Appeals  
For the  
District of Columbia Circuit*

**FILED JUN 3 1959**

*Joseph W. Stewart*

CLERK



### QUESTIONS PRESENTED

In the opinion of the appellee the questions are:

1. Whether the Court below erred in directing the verdict for the defendant at the conclusion of the plaintiff's case after weighing all of the evidence produced by the plaintiff in support of his contentions and testing its quality, substance and credibility.
2. Whether the colloquy between the Court below and the appellee's National Judge Advocate, co-counsel of record, constituted unsworn testimony not subjected to cross examination.
3. Whether the reviewing Court will consider for the first time evidence allegedly excluded by the Court below where no offer of proof was made.



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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 14,827

---

EARL B. WRIGHT, *Appellant*

v.

DISABLED AMERICAN VETERANS,  
a corporation, *Appellee*

---

**BRIEF FOR APPELLEE**

---

Appeal from the United States District Court for the  
District of Columbia

---

**COUNTER-STATEMENT OF CASE**

The appellant, plaintiff below, was appointed and served as National Service Officer for the appellee, Disabled American Veterans, beginning on or about June 1, 1946. On or about March 1, 1955 the appellant became incapacitated and went on sick leave (JA 15). After his sick leave had expired he was placed on annual leave and at the expiration of his accumulated annual leave on or



about May 10, 1955, he was placed in a status of leave without pay (JA 15). On or about August 1, 1955, while the appellant was still incapacitated, the appellee requested that the Veterans Administration withdraw the recognition of the appellant as an accredited representative, Exhibit 8 (JA 27). The recognition of the appellant was withdrawn by the Veterans Administration on August 4, 1955, Exhibit 7 (JA 26). The appellant remained incapacitated until November 1955 (JA 19). The appellant on August 8, 1956 filed suit against the appellee claiming damages for breach of contract and unpaid accrued leave.

The testimony of the appellant shows that he was never told by anyone connected with the Disabled American Veterans that he was ever discharged (JA 17-18); that when he became available for work in November 1955 he made no offer of his services to the appellee (JA 19); nor was he afforded a hearing by the appellee (JA 17) as provided for in the by-laws (JA 8). There is nothing in the record to show the appellant requested a hearing.

The appellant closed his case (JA 17, 19-20) without offering proof regarding his claim of \$1,950.00 for accrued leave.

At the close of the appellant's case the appellee moved for a directed verdict. Mr. Sylvester Hoffmann, National Judge Advocate of the appellee, co-counsel of record, argued to the Court by invitation (JA 21), during the course of the argument on the motion. The Court, after considering the evidence produced by the appellant and the arguments of counsel, directed the verdict for the appellee.

#### **RULES INVOLVED**

The rules involved are Rule 43(c) and Rule 46 of the Federal Rules of Civil Procedure.

Rule 43(c): *Record of Excluded Evidence*. "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the



examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

Rule 46: *Exceptions Unnecessary*. "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

### SUMMARY OF ARGUMENT

In a suit for damages for breach of contract of employment where the evidence shows that the appellant became incapacitated; that he was unable to perform the services required at the time of the alleged discharge from his employment; and that he never thereafter offered his services, the Court below properly directed the verdict for the appellee for failure to state a cause of action.

Argument of counsel is not testimony and is not a proper assignment of error in any event where no objection was made to the trial court.

An offer of proof of excluded testimony must be made to the trial court in order to preserve the question of error on appeal.



## ARGUMENT

### I. THE COURT PROPERLY DIRECTED THE VERDICT FOR THE APPELLEE

Appellant claims that he was discharged in violation of his employment contract. The by-laws of the appellee, Disabled American Veterans, provide that the "term of employment of a National Service Officer shall not commence until he is certified by the Veterans' Administration and shall continue only so long as such certification is in effect." The by-laws provide further that any employee with five years continuous service shall not be "discharged or his employment terminated involuntarily except after a personal hearing upon thirty (30) days written notice". Appellant specifically claims that he was discharged in violation of these provisions in that his certification by the Veterans Administration was withdrawn at the request of the appellee without his being afforded a hearing.

#### A. The Evidence Requires the Direction of the Verdict

The evidence shows, contrary to the statement in his brief, page 7 (which was that he served continuously until August 1955), that the appellant served as a National Service Officer beginning in 1946 until he became incapacitated on or about March 1, 1955 (JA 14-15). In personal service contracts it is an implied condition that the employee will be able to perform at the time stipulated for performance. The inability of the employee to perform services due to sickness or other disability discharges both parties from further performance. *Rubin v. International Film Co.*, 122 Misc. Rep. 413, 204 NYS 81; *Citizens Home Ins. Co. v. Glisson*, 191 Va. 582, 61 SE 2d 859, 21 ALR 2d 1241 (1950); *Lyon v. Pollard*, 20 Wall 403, 22 L. Ed. 361 (1874); *Restatement of the Law of Contracts*, sec. 282; *Williston on Contracts*, Rev. Ed. Vol. 6, sec. 1940; Anno: 21 ALR 2d 1247.

The evidence further shows in this case that the appellant was incapacitated and unable to perform at the time of the



alleged discharge (JA 14). In order to recover, a discharged employee must be ready, willing and able to continue in the employer's service at the time of the alleged discharge, or of the refusal of the employer to receive the employee into his employment. *Howard v. Daly*, 61 N.Y. 362; *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501; Anno: 6 LRA (NS) 59.

The appellant testified, "I never at no time indicated my unwillingness to return to work" (JA 13), but the evidence shows that when the appellant regained his health and was again able to work he did not offer his services to the appellee (JA 19).

In *Winsor v. Silica Brick Co.*, 31 Calif. App. 85, 159 Pac. 877 (1916), the Court stated:

"It is true that he testified, as he pleaded, that he was ready and willing at all times to carry out his part of the agreement, but we think that he ought to have shown that he unequivocally manifested to the defendant such readiness and willingness. In other words, we think that, since the letter announcing his release from the contract did not involve a clear and unequivocal act of dismissal, he should have shown that by some affirmative act on his part he manifested to the company that he did not acquiesce in the proposition contained in the letter, and did not desire to be released from the contract. *This he could have done by presenting himself to the defendant as ready and willing to proceed with the performance of the contract.*" (Emphasis supplied)

An employee who claims to have been discharged is bound to see that the knowledge that he refuses to acquiesce in such discharge is brought to the attention of the proper party. *Collins v. Hazelton*, 65 Mich. 220, 31 N.W. 843 (1887). Here the appellant complains that he was not afforded a hearing as required by the by-laws of the appellee, but there is no affirmative showing that he asked for one.



The direction of a verdict in a case such as this is within the sound discretion of the trial judge after weighing all of the evidence and testing its quality, substance and credibility. *Rhodes v. Metropolitan Life Ins. Co.*, 172 F.2d 183 (5th Cir., 1949). This Court in *Baltimore & O. R. Co. v. Postom*, 85 U.S. App. D.C. 207, 177 F.2d 53 (1949), reviewed the pertinent principles of law which govern the direction of a verdict. Judge Holtzoff, sitting with the Court, in his opinion stated:

"To justify the submission of a case to the jury and to permit its verdict to stand, it is necessary that there be substantial evidence to support either conclusion that may be reached. A mere scintilla of evidence is not sufficient. Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact that is sought to be sustained."

In the very case relied on by the appellant, *Jackson v. Capital Transit Co.*, 69 App. D.C. 147, 99 F.2d 380 (1938), the Court stated:

"The question is not whether there is any evidence 'but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants v. Fant*, 22 Wall. [U.S.] 116, 121, 22 L.Ed. 780. The burden being upon the plaintiff 'to establish the negligence and injury alleged; \* \* \* if the evidence failed adequately to support either element, defendant's motion should have been granted.' *Gunning v. Cooley*, 281 U.S. 90, 95, 50 S.Ct. 231, 233, 74 L.Ed. 720. The practice of directing verdicts when there is only a scintilla of evidence 'not only saves time and expense, but "gives scientific certainty to the law in its application to the facts and promotes the ends of justice."' *Pennsylvania R.R. v. Chamberlain*. 288 U.S. 333, 343, 53 S.Ct. 391, 394, 395, 77 L.Ed. 819."

In the case at bar the appellant failed to produce evidence sufficient to sustain a judgment in his favor. In



addition the evidence establishes a defense and it was the duty of the Court to direct the verdict. *Rhodes v. Metropolitan Life Ins. Co.*, *supra*.

**B. Roth v. Brownell, Jr., Attorney General of the United States, et al.**, 94 U.S. App. D.C. 318, 215 F. 2d 500 (1954)

The *Roth* case, which the appellant submits is analogous with the case at bar, can be distinguished on its facts. Roth was notified in writing that his services would be no longer required a month prior to his discharge. At the time of his discharge he was performing the duties of his position. In the present case the appellant was not working, was not able to work or to perform any of his duties. Furthermore, there is no evidence that the appellant was discharged.

## II. ARGUMENT OF COUNSEL IS NOT TESTIMONY

Mr. Sylvester Hoffmann, Esquire, a member of the Bar of the State of California, was admitted pro hac vice by permission of the trial court. The colloquy between the trial judge and Mr. Hoffmann was nothing more than permissive argument of counsel. The argument took place at the bench outside the hearing of the jury after the appellant had rested his case. If any erroneous statements were made by Mr. Hoffmann it must be assumed that the trial judge gave no weight to them.

Furthermore the appellant made no objection to the statements of Mr. Hoffmann. It has long been the universal rule, codified by Rule 46 of the Federal Rules of Civil Procedure, *Johnston v. Reily*, 82 U.S. App. D.C. 6, 160 F.2d 249 (1947), that the appellate court will not review evidence admitted where no proper objections are made thereto at trial. *Richardson v. Richardson*, 72 App. D.C. 67, 112 F.2d 19 (1940); *Boyle v. Bond*, 88 U.S. App. D.C. 178, 187 F.2d 362 (1950); *Obold v. Obold*, 82 U.S. App. D.C. 268, 163 F.2d 32 (1947); Rule 46 of the Federal Rules of Civil Procedure.



### III. THE QUESTION OF REJECTED TESTIMONY IS NOT PROPERLY BEFORE THIS COURT

The appellant complains that the trial court refused to consider testimony of the appellant on the issue of accrued leave. Rule 43(c) of the Federal Rules of Civil Procedure provides for a formal offer of proof of excluded testimony. Such an offer of proof is essential unless the significance of the excluded testimony is obvious. In this case the record is silent as to what the appellant intended to prove by his testimony and it was incumbent upon him to have brought the matter to the attention of the trial court. *Nelson v. Nelson*, 84 U.S. App. D.C. 167, 171 F.2d 1021 (1948); *Hoffman v. Palmer*, 129 F.2d 976 (2nd Cir. 1942), affirmed 318 U.S. 109; *Sorreles v. Alexander*, 79 U.S. App. D.C. 112, 142 F.2d 769 (1944).

Appellant made no offer of proof, not even an objection. Counsel for the appellant in effect assented to the Court's ruling (JA 17). In *Fort Worth and Denver Railway Company v. Roach*, 219 F.2d 351 (5th Cir. 1955), the Court stated:

"Immediately following this pronouncement [striking testimony from the record] and in language which is clearly indicative of assent counsel for the defendant said: 'Very well, Your Honor.' This being the state of the record it is apparent that no proper objection was taken to the ruling of the court and under Fed. Rules Civ. Proc., Rule 46, 28 U.S.C.A., the court's action may not be assigned as error on this appeal."



**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court in directing the verdict for the appellee is correct and should be affirmed.

JOHN J. SCHLICK  
918 - 16th Street, N.W.  
Washington 6, D. C.  
*Counsel for Appellee*

*Of Counsel:*

SYLVESTER HOFFMANN, ESQUIRE  
810 Chester Williams Building  
Los Angeles 13, California

FRED R. BRISTOL  
General Counsel  
Disabled American Veterans  
5555 Ridge Avenue  
Cincinnati 13, Ohio



APPELLEE'S PETITION FOR REHEARING BY THE  
DIVISION AND/OR BY THE COURT EN BANC

---

IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 14,827**

---

EARL B. WRIGHT, *Appellant*

v.

DISABLED AMERICAN VETERANS, a corporation, *Appellee*

---

Appeal from the United States District Court for the  
District of Columbia

---

JOHN J. SCHLICK  
918 16th Street, N. W.  
Washington 6, D. C.

*Counsel for Appellee*

*Of Counsel:*

SYLVESTER HOFFMANN, *Esquire United States Court of Appeals*  
810 Chester Williams Building *For the*  
Los Angeles 13, California *District of Columbia Circuit*

FRED R. BRISTOL  
*General Counsel*  
*Disabled American Veterans*  
5555 Ridge Avenue  
Cincinnati 13, Ohio

**FILED** NOV 12 1959

*Joseph W. Stewart*

CLERK



IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 14,827

---

EARL B. WRIGHT, *Appellant*

v.

DISABLED AMERICAN VETERANS, a corporation, *Appellee*

---

**Appeal from the United States District Court for the  
District of Columbia**

---

**APPELLEE'S PETITION FOR REHEARING BY THE  
DIVISION AND/OR BY THE COURT EN BANC**

---

In accordance with the provisions of Rule 26(a) of the General Rules of this Court, appellee respectfully petitions this Honorable Court for a rehearing by the Division and/or by the Court En Banc in the above-entitled cause and in support thereof respectfully shows:

I.

The Court in its opinion of reversal grounded its decision on the premise that the appellee's basic conten-



tion was that the "appellant abandoned his position by prolonged absence."

The appellee, in fact, contended that because of the appellant's incapacity and inability to perform the services required, the parties were excused from the performance of the personal service contract. The appellee further contended that the appellant is precluded from recovering because he was unable to perform or to re-enter into the employer's employ at the time of the alleged discharge. Both of these positions are amply supported by the evidence and by legal authorities in the appellee's brief.

The Court in its opinion has disregarded both of appellee's arguments, either one of which standing alone is sufficient to sustain the directed verdict of the District Court.

## II.

In its statement of facts, the Court, referring to the appellant, states "he became incapacitated with a back ailment requiring an operation." The Court further states that the appellant's attorney "notified DAV that his client intended to return to work." Neither of these statements are supported by the record and both are untrue. The record shows that the appellant was never hospitalized, but that he only received out-patient treatment at the Veterans Administration. The record also shows that the appellant during cross-examination, while attempting to evade a question, made the statement that his attorney communicated his intentions to return to work. Upon objection by counsel, the statement was stricken from the record and no further testimony on the point was taken on redirect examination.

The Court relying on a statement of facts, of which the above was a part, stated that the District Court "must



have determined that upon appellee's evidence the jury could only conclude that appellant abandoned his job." The appellee presented no evidence nor did the District Court mention abandonment in its ruling. Upon the appellant's evidence, a defense was revealed which required the direction of the verdict.

### III.

As a second ground for its decision, the District Court held that the appellant did not tender performance when he became ready, willing and able to work. This Court, in stating that "tender of performance is not always a prerequisite to a cause of action," relied on a series of cases which are readily distinguishable from the case at bar. In *Diffley v. Jacobson Mfg. Co.*, 6 N.J. Misc. 1044, 143 Atl. 696 (Sup. Ct. 1928), *aff'd per curiam*, 105 N.J.L. 631, 147 Atl. 908 (E. & A. 1929), the Court said: It is contended finally that it was the duty of the plaintiff to continue to tender his services. This is not true, if, as appears, he had been definitely dismissed." Here, there is no evidence of direct dismissal nor did the plaintiff once tender his services. In *Roselle v. La Fera Contracting Co.*, 18 N.J. Super. 19, 86 A. 2d 449, 453 (Super. Ct. 1952), the evidence indicated a general availability which was not present in this case, In *Croker v. Powell*, 156 So. 146, 152 (Fla. 1934), the Court held that the breach of a contract must be "positive, unequivocal and absolute." Certainly no such breach is supported by the evidence here. In *Van Denburgh v. H. T. Higginbotham, Inc.*, 168 La. 461, 122 So. 581 (1929), the plaintiff relied on the Civil Code in his suit for damages for the breach of a contract. Even in that case the Court held that "in order to recover, plaintiff had to show that he had complied with the terms of his contract until dismissed without serious ground of complaint."



In the case at bar, the appellant's own testimony shows that he was never directly discharged and he never presented himself as ready to continue in the performance of his duties. The Court, commenting on the facts, states "appellant \* \* \* never indicated an unwillingness to return to work." However, the law requires that the employee manifest his readiness and willingness to carry out his part of the agreement. This manifestation must be shown by an affirmative act; the requirement is not satisfied by silence. The acceptance of another position by the appellant when he was ready, willing and able to work, without offering to return to work for the appellee, constituted the abandonment.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing by the Division and/or by the Court En Banc be granted and that the judgment of the District Court be, upon further consideration, affirmed.

JOHN J. SCHLICK

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**Certificate of Counsel**

I, John J. Schlick, counsel for appellee, do hereby certify that the foregoing petition for rehearing by the Division and/or by the Court En Banc of this cause is presented in good faith and not for purpose of delay.

JOHN J. SCHLICK

**Certificate of Service**

This is to certify that a copy of the foregoing petition for rehearing by the Division and/or by the Court En Banc has been served this 12th day of November, 1959, first class mail, postage prepaid, upon Robert T. Smith, 428 Barr Building, Washington, D. C., and W. Perry Doing, Evans Building, Washington, D. C.

JOHN J. SCHLICK